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No. 111 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1957

LIONEL A. DOMINGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 225) affirming the judgment of the District Court is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 24, 1957 (R. 227), and a petition for rehearing was denied on June 25, 1957 (R. 230). The petition for a writ of certiorari was filed on July 22, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

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QUESTION PRESENTED

Whether the evidence is sufficient to support the verdict.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> (a) *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.
>
> * * * * *

(26 U. S. C. 1952 ed., Sec. 145 (a).)

STATEMENT

On March 25, 1955, there was filed in the Eastern District of Louisiana a two-count information charging petitioner with having wilfully failed to file his individual income tax returns for the years 1952 and 1953, in violation of Section 145 (a) of the Internal Revenue Code of 1939. The information alleged that

petitioner had received a gross income of $498,779 in 1952 and $505,909 in 1953. (R. 2, 11.) The case was tried before a jury on October 29 and 30, 1956 (R. 6, 7) and petitioner was found guilty on both counts. (R. 214.) On November 9, 1956, petitioner was fined $10,000 on each count and sentenced to one year of imprisonment on each count, the sentences to run consecutively. (R. 218.)

The evidence to support the verdict may be summarized briefly as follows:

During the prosecution years, petitioner owned and operated two lottery companies. (R. 35, 67.) Each maintained a complete and satisfactory set of books (R. 41–45, 49, 70, 93) which, taken together, reflected the gross income alleged in the information, $498,779 in 1952 and $505,909 in 1953 (R. 47). Prior to the investigation, a 1952 income tax return had been prepared by petitioner's accountant, E. J. Robert, showing a taxable income of $36,321.82 (R. 51, 95–96, 115) and a tax liability of $15,580.75 (R. 120). These amounts were within a few hundred dollars of those computed by the Treasury agents. (R. 52, 95–96.) The 1952 return, however, was never filed, nor did petitioner file returns for 1951 or 1953. (R. 64, 101.) Robert called to petitioner's attention the fact that the returns were due on certain dates and that he would either have to file them or get an extension. (R. 108.) A 30-day extension was secured for filing the 1952 return, and possibly a 60-day extension for 1953, but they were permitted to expire. (R. 111, 122.)

During the years in question, petitioner was far behind in his payments of federal wagering and withholding taxes. (R. 155.) He was making weekly and bi-weekly payments on these obligations, and the Collector's office, although it was unable to "find any assets * * * tried every effort to get him to pay it." (R. 131–132.) Whenever petitioner made a payment on his delinquent wagering taxes he was furnished with a receipt showing the amount applied to principal and that applied to interest. (R. 78.)

During the investigation, petitioner explained to the Treasury agents that the reason he had not filed his 1952 income tax return was that his accountant did not have full information as to allowable deductions on account of interest paid to the Government. (R. 60–61.) Robert, testifying at the trial, confirmed this to some extent, but stated that he had been refused this information because he did not have "a power of attorney, or something of that kind." (R. 121.) When asked whether he had done anything further on the matter, Robert replied that he had waited for petitioner "to move, because I advised him that he had better make the inquiry, as he was the taxpayer." (R. 122.) The breakdown between interest and principal is, of course, readily available to any taxpayer who requests it. (R. 138.)

With respect to the 1953 return, Robert stated that he lacked the same information (*i. e.*, interest paid to the Government) plus data as to other deductions, such as charitable contributions and taxes paid. (R. 125–126.) Petitioner's allowable deductions on ac-

count of interest paid to the Government totalled $221.78 for 1952 and $533.47 for 1953. (R. 155.)

Petitioner did not testify at the trial, and the defense adduced no evidence.

ARGUMENT

Petitioner's sole contention is that the evidence did not establish that his failure to file his 1952 and 1953 income tax returns was willful. It is conceded (Pet. 8) that there is "no doubt but that he knew of his obligation to keep the required records and to file the said income tax returns", and he admitted to the investigating agents that he knew he had not filed (R. 60). The circumstances surrounding petitioner's failure to file are set forth above and need not be repeated in detail. He had filed returns for 1949 and 1950 (R. 102) but then ceased to file. He filed no returns for 1951, 1952, 1953 or 1954. (R. 64, 101, 116.) This consistent pattern of failure to file for four successive years is itself some evidence of willfulness. The excuse that these failures resulted from the lack of data as to the amounts of interest paid the Government is belied by (a) the testimony of petitioner's accountant, Robert, that he had asked petitioner to secure it; (b) the fact that the information was readily available on request, and petitioner already had some of the information in his files; (c) the fact that the actual amounts of the allowable deductions were small, being well under one per cent of the taxable income in 1952; and (d) the fact that Robert reminded petitioner that the returns were due on certain dates and that he would either have to

file them or get extensions. (*Supra*, pp. 3–5.) On the issue of petitioner's motive in not filing, the jury were plainly entitled to consider his straitened financial circumstances and the fact that he was delinquent with respect to the payment of federal taxes other than income taxes. (*Supra*, p. 4.)

The gist of the petition is that the fault lay entirely with Robert, the accountant, who was at best incompetent and at worst grossly negligent. This argument is at war with the fact that Robert was still doing petitioner's accounting work at the time of the trial, in October, 1956. (R. 6, 7, 112.) Petitioner was entitled to make this contention to the jury but it cannot help him here, in the face of the substantial evidence of guilt adduced by the Government. Cf. *Glasser* v. *United States*, 315 U. S. 60, 80.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957